

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 54 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

AHMADBHAI E PATEL

Versus

ABUDULGANI ISHABHAI KACHHOT

Appearance:

MR NITIN M. AMIN for Appellant

MR KG PANDIT for Respondent No. 1

MR ND GOHIL ADDL. PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 25/02/2000

C.A.V. JUDGEMENT

#. This is an appeal under Section 378(4) of Cr. P.C. 1973 read with Sub-Section (1) of Section 378 of Cr.P.C. 1973 preferred by original complainant challenging the judgment dated 22-1-1990 rendered by the learned

Metropolitan Magistrate, Court No. 9, Ahmedabad in Summary Criminal Case No. 5 of 1987 which was on his file.

#. The appellant was complainant and respondent No.1 was accused in the said Summary Criminal Case No. 5 of 1987. Respondent No.2 is the State of Gujarat and therefore for the sake of convenience and brevity the parties will be referred to as complainant and accused hereinafter.

#. The facts leading to this present appeal in a nut shell are as follows:-

It is the case of the complainant that there is one office of Sunni Muslim Wakf Committee situated on Salapose Road, Ahmedabad and that Committee is a public trust having Registration No. B-447. It is further the case of the complainant that said Committee is doing management of many Muslim trusts of Ahmedabad. There is one Hazrat Pir Kamaal Kabrastan under the management of said Committee and that Kabrastan is situated opposite to Nagri Hospital in Navrangpura area at Ahmedabad. It is the case of the complainant that one Shri Syed Zabbarhusen Khairuddin Kadri is the President of the said Committee and present complainant is the Secretary of the said Committee.

It is the case of the complainant that accused Abdulgani Ishabhai Kachhot was employed as Recovery Clerk by said Committee for the management of Hazrat Pir Kamaal Kabrastan. It is the further case of the complainant that for residence of accused one room bearing Municipal Census No. 370/N/1/2 (Survey No. 461/1/2) situated in said Kabrastan was given on rental basis to accused and for that a rent note was executed on 29-4-1975 along with the sketch and it was one of the terms and conditions of the said rent note that said room was given to accused on rental basis for very limited period upto the date of his employment and it was so agreed to by the accused that he would vacate the said room as soon as he would be out of service. Rent was fixed @ Rs.5/- p.m. and it was agreed to by accused that he would pay the respective taxes separately for the said room. For the purpose of employment the accused was being paid Rs.652-20ps as pay, per month.

It is the case of the complainant that accused has encroached upon the major portion of the land of said Kabrastan and he has trespassed in the land of Kabrastan. Said Committee has filed one Civil Suit No. 3896 of 1983 in the City Civil Court, Ahmedabad to recover back the

possession of said encroached land from the accused. The complainant has made it clear that his private complaint on the basis of which Summary Criminal Case No. 5 of 1987 is registered is not for the lands encroached upon by the accused for which a Civil Suit No. 3896 of 1983 has been filed. The complainant has come with a very specific case that after filing that suit in the City Civil Court, Ahmedabad, accused has unauthorisedly and illegally encroached upon the land admeasuring 22.13 sq. yds. (199 sq.ft. and 3 sq. inches) of the Committee from the land of Kabrastan. It is the case of the complainant that accused has made some construction in the said land encroached upon by him on or about 25-10-1986 and for this encroachment of land admeasuring 22.13 sq. yds. which is of the ownership of Kabrastan, the complainant lodged his private complaint in the Court of Metropolitan Magistrate on 1-1-1987, alleging that accused has committed an offence of encroaching upon and committed trespass, in the land of ownership of Kabrastan. The day on which the complainant lodged his complaint against the accused, the learned Metropolitan Magistrate took cognizance and issued summons for an offence punishable under Section 447 of the Indian Penal Code. The accused appeared before the Trial Court through his advocate. His plea was recorded on 5-10-1987. The complainant led his evidence by examining himself and four other witnesses. He also got produced some documentary evidence before the Court and after hearing and appreciating the evidence of both the parties, the learned Metropolitan Magistrate came to the conclusion that the complainant has failed to prove the case against the accused for offence punishable under Section 447 of I.P.C. and therefore on 22-1-1990 by rendering his judgment under sub-paragraphs 7 and 8 of Summary Form Exh. 2, acquitted the accused by giving them benefit of doubt.

#. Being dissatisfied with and aggrieved against the said judgment and order of acquittal, the original complainant has by seeking the permission of this Court under Section 378(4) of Cr.P.C. read with subsection (1) of Section 378 of Cr.P.C., filed this appeal.

#. I have gone through the entire original record of the case which has been called for from the trial Court. I have heard Shri Nitin M. Amin, the learned advocate for the appellant, Shri K.G.Pandit, the learned advocate for the respondent No.1 and Shri N.D. Gohil, the learned A.P.P. for the respondent No. 2 State. Shri N.D. Gohil, learned A.P.P. has supported the case of the appellant.

#. In this case there are some admitted facts for which there is no dispute.

(1) Complainant Shri Sabdalkhan Aminkhan Chauhan is the Secretary of Sunni Muslim Wakf Committee and he is empowered to lodge the complaint by exercising powers delegated to him by the President of the Committee. The Committee is doing management of Hazrat Pir Kamaal Kabrastan situated in Navrangpura area, Ahmedabad. Accused was an employee of the said Committee and for the purpose of his residence one room of ownership of the Committee was given on rental basis to accused and for that a rent note was executed by accused on 29-4-1975.

(2) During the period from 29-4-1975 to the date on which Civil Suit No. 3896 of 1983 was filed in the City Civil Court, Ahmedabad, as per the case of the complainant, accused had encroached upon the land of Kabrastan but at that time, no criminal complaint was lodged but only Civil Suit No. 3896 of 1983 was filed in the City Civil Court, Ahmedabad and as on the date of complaint, i.e., as on 1-1-1987 that suit was pending before the Civil Court.

(3) A specific case has been advanced that on or about 25-10-1986, the accused has encroached upon the land admeasuring 22.13 sq. yds. of the ownership of Kabrastan and by making construction in that land the accused has committed a criminal trespass and for that this present complaint is lodged.

#. It cannot be gainsaid that a rent note was executed by accused on 29-4-1975 and it was a written rent note along with sketch to show as to what property has been let to the accused. It is the case of the complainant that only one room bearing Municipal Census No. 370/N/1/2 was given to accused on rental basis. The accused has denied the case of the prosecution and a case has been advanced in paragraph 5 of written arguments Exh. 12 filed by the accused that he is in possession of open land with some constructions along with room as a tenant and that he has not encroached upon any land of Kabrastan illegally, meaning thereby, it is the defence of the accused that since very beginning he was given the room along with open land in front of that room as a tenant and he is in legal possession of the said open land in his capacity as a tenant. Under the circumstances, it is necessary to know as to what exact area of the land was given to the accused on rental basis on or about 29-4-1975. When it is an admitted fact that

accused has executed a written rent note along with a sketch, then it was the duty of the prosecution to produce that rent note in the case so that it can be ascertained from that rent note and sketch attached thereto as to what exact area of the land was given to the accused on rental basis. The complainant has not given any explanation for not producing the most important documentary evidence of rent note in the case. He has withheld that best available documentary evidence for reasons best known to him and therefore an adverse inference can be drawn against him that had he produced that rent note with sketch before the trial court, he could not have proved his case of alleged encroachment of land admeasuring 22.13 sq. yds, as complained in his Complaint Exh. 1.

It is also admitted fact that during the period from 29-4-1975 to the date on which Civil Suit No. 3896 of 1983 was filed, the accused had encroached upon bigger portion of the land of Kabrastan for which the said Committee has filed civil suit in the City Civil Court, Ahmedabad. There is no specific evidence as to what exact area of land that had been encroached upon by the accused till the date on which civil suit was filed in the Civil Court, Ahmedabad and evidence is not clear as to whether land for which present complaint has been filed was part and parcel of the land alleged to have been encroached upon by the accused for which the civil suit is filed in the City Civil Court, Ahmedabad.

The complainant has examined himself at Exh. 3. He has admitted that accused has been removed from the service on 7-11-1986. This complaint has been filed on 1-1-1987 and therefore before filing the complaint the accused was already removed from service. Complainant has deposed in his evidence that accused has constructed one bathroom and laid connections of water and gutter in the said land, as a result of which one passage leading to mosque has been closed. His assertion that due to encroachment of the land one of the two passages leading to mosque has been closed, is not there in the complaint and it seems that this assertion is made with a view to impress upon the court that accused has made encroachment on the passage leading to mosque. He has also admitted in his evidence that the Committee has not given land on which accused has made construction, on the rental basis. Prosecution has not made it clear as to what exact area of the land was given to accused on rental basis. When a case is put, by the complainant in his complaint that only one room was given to accused and no other land surrounding the room was given then that fact is required

to be proved by the complainant, beyond reasonable doubt and that can only be proved by producing documentary evidence of rent note executed by accused.

#. The complainant has examined Imdarhusein Mohammadali at Exh. 4. He is serving as Recovery Clerk in the office of the Committee. Accused was predecessor of this witness. He has deposed that only one room admeasuring 10' x 10' was given to accused on rental basis for the purpose of his residence. He has also admitted that for the encroachment of the land made by accused, one civil suit has been filed in the year 1983 and accused has been removed from service as he made further encroachment in the year 1986. He has deposed that accused has made construction of shed of iron sheets and one wall in front of his room, as a result of which the passage leading to mosque is blocked. As per the evidence of complainant, one chowkidar Iqbal had prevented accused from making encroachment of the land of Kabrastan but accused did not stop the construction in the encroached land, as a result of which that chowkidar Iqbal gave a written report to the complainant. That written report is not forthcoming on the record. That report is the best available documentary evidence which is in possession of complainant to show that at the earliest point of time chowkidar Iqbal made a protest to prevent the accused from making construction in the land in front of the room.

It was the contention of the accused in trial court that prosecution has not examined that chowkidar Iqbal. The prosecution has given an explanation in evidence of Imdarhusein Mohammadali that zamadar has left India for Pakistan and therefore that zamadar is not examined. This witness has also deposed that accused has made encroachment of land of around 22 sq. yds. but he has admitted in cross-examination that he is not able to say as to what is the total area of the land of Kabrastan and therefore important piece of evidence with regard to total area of the land of Kabrastan and exact area of the land encroached upon by the accused was not made available to the trial court.

#. The prosecution has examined one Jayantibhai Kantibhai at Exh. 5 who is serving as Superintendent in City Civil Court, Ahmedabad. He has produced one panchnama, Exh. 6 dated 19-10-1983. This panchnama is not relevant for this criminal complaint because that panchnama was made for the purpose of proving alleged encroachment of the land made prior to October 1983 for which a civil suit has been filed. The case of the

prosecution is that this present complaint has been lodged for the encroachment of land admeasuring 22.13 sq. yds which he made on 25-10-1986 and therefore panchnama which was prepared in the month of October, 1983 is not at all relevant for this present complaint.

##. The prosecution has examined one Gulamnabi Ahmedmiya Malek at Exh.7. This witness was appointed as Court Commissioner in the proceedings of Civil Suit No. 3896 of 1983 and he in company of one panch for and on behalf of the complainant went to the site of Kabrastan and he prepared a panchnama Exh. 8. This panchnama was drawn in absence of accused and therefore it can be said that that panchnama was exparte panchnama. By examining this witness Gulamnabi Ahmedmiya Malek, at Exh. 7 and by producing panchnama at Exh. 8, prosecution wants to prove that sketch was prepared by the Court Commissioner and as per that sketch which is an accompaniment of panchnama Exh. 8, the portion shown by mark A was a room of the plaintiff which is admeasuring 14' and 7". Towards east of said room shown as Mark A, there is one another room Mark B admeasuring 11.9" x 11.3" and there is one another third room towards east of Mark B and that third room which is shown as Mark C is admeasuring 16' x 12'. It is stated in this panchnama Exh. 8 that there is a bathroom in portion C. In short, particulars have been given of, the existing rooms etc. as on 14-11-1986 described in panchnama Exh. 8. It may be noted that this panchnama was drawn on 14-11-1986. The complainant has admitted in his evidence that accused has been removed from the service on 7-11-1986 and therefore this panchnama was drawn after removal of accused from service and therefore this evidence cannot be used against accused because this panchnama was not drawn in his presence. For a moment if it is believed that this panchnama, Exh. 8 and sketch prepared by the Court Commissioner Gulamnabi are correct, then from this panchnama it may possibly be inferred that whatever the constructions which are described in this panchnama, Exh. 8, were made by the accused. For a moment if it is believed that said constructions were made by the accused, then it cannot be further inferred that land below the said constructions was not given to accused on rental basis, on 29-04-1975 and therefore this panchnama Exh. 8 and sketch, lead us nowhere.

##. The prosecution has examined last witness Ahmed Yusufji at Exh. 10. This witness is the President of the said Committee and he rendered his services as Member of the said Committee for a period from 1982 to 1987. As stated in the complaint, it is the case of the

complainant that only one room was given to the accused. While this responsible office-bearer of the said Committee has deposed in his examination-in-chief that there was one hut on southern side of the mosque and that hut was demolished and that land beneath the said hut was given to the accused for the residential purpose. This witness came to know that in September/October, 1986 the accused had brought bricks etc and started making construction work but thereafter the complaint came to be lodged in the month of January 1987. There is no explanation from the complainant as to why such inordinate delay has been caused in lodging the complaint.

##. In view of the discussion made hereinabove, the prosecution has not led a satisfactory cogent evidence to prove the case against the accused. The learned Magistrate has appreciated the evidence led by the complainant in correct perspective. The complainant has withheld the best available evidence of rent-note with sketch thereto. The complainant has also withheld the best available evidence of the plaint of the civil suit which has been filed against the accused to show that what area of land was encroached upon by the accused before the date of filing of the Civil Suit in the year 1983 and therefore in absence of such important documentary evidence, though available, no inference can be drawn that accused has encroached upon the land admeasuring 22.13 sq. yds. as alleged in the complaint.

The learned Magistrate has given reasons in detail for the decision arrived at, by him. This Court cannot replace its own decision, if any, in place of the possible decision arrived at by the learned Magistrate. This Court finds that the learned Magistrate has correctly appreciated the evidence and has come to a correct decision and therefore this Court finds that there is no reason to differ from the view taken by the learned Magistrate.

##. Under the circumstances, this Court is of the view that there is no reason to disturb the finding arrived at by the learned Magistrate.

##. In this view of the matter, this appeal deserves to be dismissed and therefore this appeal is dismissed by confirming the acquittal judgment rendered by the learned Metropolitan Magistrate, Court No. 9, Ahmedabad in Summary Criminal Case No. 5 of 1987.

(H.H. Mehta, J)

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